NO. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al., Appellants,*

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al./Appellees.*

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

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REPLY TO PETITION FOR REHEARING ON BEHALF OF SOUTHERN RAILROAD APPELLEES

JOHN W. ADAMS
PHIL C. BEVERLY
JAMES A. BISTLINE
H. T. COOK
HOWARD D. KOONTZ
E. R. LEIGH
JOHN E. McCULLOUGH
DONAL L. TURKAL

PHELPS, DUNBAR, MARKS CLAVERIE & SIMS

SIDLEY & AUSTIN

Of Counsel.

ASHTON PHELPS
JACK M. GORDON
1300 Hibernia Building
New Orleans, Louisiana
70112

HOWARD J. TRIENENS
GEORGE L. SAUNDERS, JR.
R. EDEN MARTIN
11 South LaSalle Street
Chicago, Illinois 60603

Attorneys for Appellees Aberdeen and Rockfish Railroad Company, et al.

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Preliminary Statement

In their Petition for Rehearing the Northern railroads seek to retain over $25 million in divisions collected under an order of the Interstate Commerce Commission which this Court has held to be unsupported by substantial evidence. They also seek to continue to collect higher Northern divisions under that same invalid order. The stated justification for these requests is that it would be expensive to reestablish the previously effective equal-factor basis of divisions.

The petition rests entirely on the premise that if upon remand the Commission again gives the Northern railroads a higher basis of divisions, North-South divisions would have to be retroactively adjusted in accordance with the

Commission's new order (Petition, p. 3). This premise is never established in the Northern railroads' petition and is, in fact, demonstrably false.

The principles which govern the disposition of this petition are clear, having been recognized by the Northern railroads themselves in the district court, where they proposed and consented to the provision of the district court decree which imposed upon them the obligation to restore these revenues to the Southern railroads if the Commission's order were found to be unlawful. But for their agreement—which the Northern railroads now would have this Court rescind—the Commission's 1965 order would have been enjoined pending judicial review, the inflation in the Northern railroads' divisions would not have gone into effect, and the sums the Northern railroads now seek to retain would now be in the posession of the Southern railroads.

As we shall also show in this reply, the Northern railroads seek an order which, in addition to repudiating their agreement in the court below, would violate the policy of the Interstate Commerce Act and would frustrate rather than further the aims of equity.

I. EQUITY SHOULD NOT RELIEVE THE NORTHERN RAILROADS OF THEIR OBLIGATION TO RETURN THE MONEY COLLECTED UNDER THE COMMISSION'S INVALID ORDER.

A basic deficiency in the Northern railroads' Petition for Rehearing in this case arises from the total failure of the petition to deal with the promise which they made in the district court to return to the Southern railroads the money collected under the Commission's order of February 3, 1965, if that order were subsequently held to be invalid. The Northern railroads admit that the district court's order of

June 3, 1965, denying an interlocutory injunction in this case, "provided that the railroads would be obliged to resettle their interline accounts on the basis of the pre-existing divisions as to all traffic moving after April 20, 1965, if the Commission's order should be 'permanently set aside' (A. 169-171, 359)" (Petition, p. 2).

However, the Northern railroads do not inform the Court that this protective condition was included in the order denying the injunction because they proposed it as an alternative to an interlocutory injunction; nor do they inform the Court that this obligation was made effective upon the filing of written consent by the Northern railroads.[1] In none of the cases relied upon in the Petition for

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[1] The order of the district court denying the application of plaintiff Southern railroads for an interlocutory injunction provides as follows (A. 169-170):

"3. The foregoing denial of the application for interlocutory injunction and dissolution of the temporary restraining order is subject to the following conditions, to which the intervening defendants, The Baltimore and Ohio Railroad Company, et al., have agreed by filing written consent with the Clerk of this Court:

"A. In the event the plaintiffs are successful in permanently setting aside the order of the Interstate Commerce Commission of February 3, 1965, intervening defendants, The Baltimore and Ohio Railroad Company et al., *will resettle their accounts with plaintiffs, on traffic covered by the order of the Commission, on the basis of the present divisions, on all shipments made on and after April 20, 1965,* with interest at the rate of 5% per annum on the monthly differences between revenues based upon the divisions prescribed by the Commission and revenues based upon the divisions now in effect, the said interest to be calculated from the customary accounting monthly settlement dates.

* * *

"C. Upon the happening of the event specified in para-

Rehearing was there a consent decree providing for resettlement, and the Northern railroads do not even discuss the controlling principle that a decree entered by consent is not subject to general review by an appellate court. As this Court held in the leading case on consent decrees, *Swift & Co.* v. *United States,* 276 U.S. 311, 324 (1928):

> "Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered, . . . or of fraud in its procurement; . . . or that there was lack of federal jurisdiction because of the citizenship of the parties. . . . But 'a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.' *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States,* 113 U.S. 261, 266."

This Court has applied this principle to a decree containing a commitment to return revenues collected pending review of an order of the Interstate Commerce Commission. In *Chicago, Milwaukee, St. P. & P.R. Co.* v. *Illinois,* 356 U.S. 906 (1958), the Milwaukee Railroad had sought and received from the Commission an order increasing intrastate rates on the ground that the existing low intrastate rates constituted an undue burden on interstate commerce. The State of Illinois sought judicial review, and the district court set aside the Commission's order for want of adequate findings and for reliance on evidence improperly received (146 F.Supp. 195 (N.D. Ill. 1956)). Pending ap-

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graph A . . . hereof, intervening defendants, The Baltimore and Ohio Railroad Company et al., shall be required to reimburse plaintiffs for their reasonable expenses for accounting change-overs incurred as a result of this denial of the application for interlocutory injunction." (emphasis supplied)

peal, the district court stayed its judgment setting aside the Commission's order on the condition, agreed to by the Milwaukee in open court, that the amount of the increase in rates would be refunded in the event the judgment of the district court were affirmed (see 168 F.Supp. at 707; 355 U.S. at 302, note 2). On appeal, this Court affirmed the judgment setting aside the Commission's order on the ground of inadequate findings, modified the district court's judgment to the extent that it held the Commission had considered improper evidence, and remanded the case to the Commission for further proceedings. *Chicago, Milwaukee, St. P. & P. Co.* v. *United States,* 355 U.S. 300, 307-309 (1958). Thereafter, the Milwaukee sought in the district court to delay the refund of the increased rates "pending the further proceedings before the Commission contemplated by the judgment of this Court" (356 U.S. at 907). The district court denied the Milwaukee's request and ordered an immediate refund. The Milwaukee applied to this Court for a writ of supersedeas, which was denied without opinion (356 U.S. 906).[2]

There can be no question that the decree entered with the consent of the Northern railroads in this case requires immediate return to the Southern railroads of the revenues collected as a result of the Commission's invalid order of February 3, 1965. The decree specifically states that resettlement will be "on the basis of the present divisions," not some basis that the Commission might prescribe in a

[2] Mr. Justice Frankfurter, dissenting with three other Justices, was of the opinion that the Milwaukee should have been relieved of its resettlement obligation on the ground that statutory policy and the public interest so required. For reasons discussed *infra* (pp. 12-24), such considerations operate in just the opposite direction in this case and provide further reasons for enforcement of the Northern railroads' agreement, not for its rescission.

future order following remand. The commitment was to resettle in the event the Southern railroads were successful in "permanently setting aside the order of the Interstate Commerce Commission of February 3, 1965." The North now attempts to play on the word "permanently" (Petition, p. 2), but that word simply contrasted the action of the district court on the merits of the request for a permanent injunction setting aside the Commission's order of February 3, 1965, with the request for an interlocutory injunction which was under consideration at the time the consent decree was entered.

The Commission's order of February 3, 1965, has now been held to be unsupported by substantial evidence both by the district court (A. 349) and by this Court (393 U.S. at 91). As required by Section 10(e) of the Administrative Procedure Act,[3] the final judgment of the district court (A. 357), affirmed by this Court (393 U.S. at 96), sets aside the Commission's order.[4] This holding has not been challenged by the Northern railroads in their Petition for Rehearing. Thus, the Commission's order of February 3, 1965, will never—under any circumstances—go into effect. If the Northern railroads ever succeed in proving that they are entitled to a higher basis of divisions than the Southern railroads, it would have to be by virtue of some new order of the Commission based upon a different record contain-

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[3] "The reviewing court shall . . . set aside agency action . . . found to be . . . unsupported by substantial evidence. . . ." (5 U.S.C. § 706)

[4] The modifications in the judgment ordered by this Court went to the several specific findings required on remand, not the conclusion that there was a lack of substantial evidence to support the Commission's order (as discussed at pp. 17-21, *infra*). A far more fundamental difference between the grounds of decision adopted by the Supreme Court and those relied upon by the district court was not sufficient to relieve the Milwaukee Road of its agreement (p. 5, *supra*; 356 U.S. at 908-909).

ing evidence necessary to support such an order. The validity of any such future order could not operate to resurrect the one which has been invalidated in the present proceedings.[5]

The Northern railroads' own pleadings in the district court make it abundantly plain that their agreement was to restore the uniform basis of divisions once the Commission's order was set aside, even if (as the Northern railroads erroneously assume in ignoring the Court's holding that there was a fundamental lack of substantial evidence) the judgment setting it aside rested only on the inadequacy of findings with respect to three important cost items (Petition, p. 2). When Appellants appeared before the district court in opposition to the Southern railroads' application for interlocutory injunction, they urged that if the Commission's order of February 3, 1965, were found to be deficient with respect to a single cost item, the order would have to be set aside in its entirety and would have no further effect. The Northern railroads took this position in opposing the contention of the Southern railroads that the order should be set aside only in part because the Commission's invalid action prescribing an inflation in the Northern divisions was separable from its valid determination that the terminal factor in the pre-existing uniform divisional scales was prejudicial to the long-haul Southern railroads.[6]

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[5] Moreover, in this case, any new order would necessarily differ from the order herein found to be invalid. For example, the court below and this Court have held that the Southern railroads could not be burdened with "costs related solely to commuter service in the North." (393 U.S. at 94; see A. 344-346) Any future order of the Commission would have to reflect the cost adjustments which necessarily follow.

[6] The background of this contention is discussed in Appellee Southern Railroads' Brief (pp. 77-80). The district court agreed with the Northern railroads and the Commission in holding that "the Commission's order is not severable" (A. 330).

The Northern railroads unequivocally stated their position as to what the proper disposition of the case would be if the Southern railroads were successful in showing the Commission's order of February 3, 1965, "to be legally deficient in some respect":

> "Intervening Defendants are confident that, upon final review, the Court will conclude that the Commission's order is in all respects lawful. *But if the Court should find it to be legally deficient in some respect,* its decree, in the terms of the statute, would be one to enjoin, set aside, annul or suspend the said order. *Thereafter the Commission's report and order would have no effect.*
>
> "It is respectfully submitted, therefore, that any condition for readjustment of the divisions which would be required as a result of a possible annulment of the Commission's order *should be on the basis of the divisions which are now in effect and which have been in effect for the past twelve years, the divisions which represent the status quo.*" (emphasis supplied)[7]

The Northern railroads thus made it as plain as language permits that they fully understood, and indeed urged, that

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[7] Memorandum in Opposition to Application for Interlocutory Injunction, May 17, 1965, p. 26.

Counsel for the United States and for the Interstate Commerce Commission appeared at the hearing on the interlocutory injunction, but left it to the "parties having a financial interest" to argue the question of whether the injunction should or should not issue. (Memorandum of United States and I.C.C., May 21, 1965, pp. 1-2). The position of the Government was summarized as follows (*id.* at 7-8):

> "To preserve the status quo this Court should impose a condition which would require either resettlement from April 20, 1965, on the new prescribed basis if a preliminary injunction is granted or, if a preliminary injunction is not granted, resettlement from April 20, 1965, *on the basis of the divisions which have been in effect for the past 13 years . . .*" (emphasis supplied).

if the Commission's order of February 3, 1965, were found to be invalid "in some respect," that order should be set aside with the result that the pre-existing uniform basis of divisions would be restored and the resettlement conditions would become operative.

In view of the clarity of the provisions of the consent decree entered by the district court and the context in which that decree was entered, there exists no genuine question of interpretation with respect to that decree. If the issue which the Northern railroads seek to present were actually one of interpretation, they doubtless would have presented that issue to the district court, which ought to interpret its own decree, at least in the first instance. What the Northern railroads seek here, therefore, is not an interpretation of the consent decree but relief from that decree and from the obligation which they assumed in consenting to it. There is not the slightest basis for any such relief under the standards which govern the application of consent decrees.

The principles applicable to review of consent decrees were summarized as follows in *Walling* v. *Miller*, 138 F.2d 629, 631 (8th Cir. 1943), cert. denied, 321 U.S. 784 (1944):

> "The law is that a decree entered by consent may be reviewed upon appeal or bill of review where there is a claim of lack of actual consent to the decree as entered; or of fraud in its procurement; or that there was lack of federal jurisdiction. But 'a decree, which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause.' All errors going to the merits and remediable on appeal are waived by consent to the decree. . . . *Swift & Co.* v. *United States*, 276 U.S. 311, 324, 326, 327. . . .
>
> "One reason for the rule is obvious. A court which, having jurisdiction of the parties and of the subject matter, renders a consent decree, if it sustains a motion

> of one of the parties to vacate such decree, not only sanctions the breach of a contract but in effect becomes a party to the breach. . . .
>
> "There is no claim here that the parties were not competent to contract; or that there was lack of consent; or that there was fraud in the procurement of the decree. Neither can it be doubted that the court at the time the decree was entered had general jurisdiction of the subject matter and of the parties. The court so found, and no appeal was taken by the defendants from that finding."

Having proposed the consent decree in the district court, the Northern railroads are now bound by their agreement. They fully understood that their obligation to resettle and restore the pre-existing divisions would become operative under the circumstances which now exist. And the Northern railroads proposed and consented to the decree with the full knowledge that they had waived any right to retroactive relief in the event of a remand to the Commission.[8]

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[8] In a pleading filed in another divisions case shortly before the entry of the consent decree here, the same counsel for the Northern railroads recognized that the decision of this Court requiring immediate refund in *Milwaukee Road,* 356 U.S. 906, had been

> "influenced by the fact that the carrier which held excess fares had consented to a distribution thereof if the administrative order were set aside *and thereby waived its right to retroactive relief in the event of a remand of the cause to the Interstate Commerce Commission."* (emphasis supplied)

(Objections of Intervening Railroad Defendants, February 3, 1965, p. 10, in *Atchison, T. & S. F. Ry. Co.* v. *United States,* S.D. Calif, Civil Action 63-745-EC).

In another divisions dispute between the same Northern roads and Western railroads, the North had agreed to resettle in the event the order of the Commission under review were set aside, as it was in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 225 F.Supp. 584 (D. Colo. 1964). Although that case was also remanded to the Commission for further proceedings, the Northern railroads did not attempt to avoid their obligation but restored the pre-existing divisions and completed the resettlement in 1964.

Had it not been for the resettlement condition in the district court's order, which the Northern railroads proposed and to which they consented, the Commission's order of February 3, 1965, would have been enjoined pending this litigation, and the Southern railroads would today have in their possession the revenues in controversy. If the district court had known at the beginning of this action for judicial review what it later concluded on the merits—namely, that the Commission's order is not supported by substantial evidence—the Commission's order would have been enjoined at the outset. However, issuance of the interlocutory injunction pending determination of a judicial review proceeding requires a showing of irreparable injury. The purpose and effect of the Northern railroads' agreement to restore the uniform basis of divisions for the period after April 20, 1965, in the event the Commission's 1965 order were set aside, was to eliminate the Southern railroads' claim of irreparable injury. Having accomplished that purpose, and having thus obtained possession of the revenues which belong to the Southern railroads, the Northern railroads are now estopped from seeking to annul their agreement. The Northern railroads are not prejudiced by enforcement of the terms of the district court's order, to which they consented, since enforcement will simply restore the parties to the same position they would be in today if an interlocutory injunction had issued.

Accordingly, equity should leave the Northern railroads precisely where they agreed to be when they proposed and consented to restore the uniform basis of divisions in the event the Commission's order of February 3, 1965, were set aside.

II. THE ORDER SOUGHT BY THE NORTHERN RAILROADS IS CONTRARY TO THE POLICY OF SECTION 15(6) OF THE INTERSTATE COMMERCE ACT.

The Northern railroads' consent to restore the pre-existing uniform basis of divisions disposes of the issues raised by Appellants in their Petition for Rehearing. In addition, the order sought by the Northern railroads should be denied because it is flatly inconsistent both with the language of Section 15(6) of the Interstate Commerce Act (49 U.S.C. § 15(6)) and with the policy underlying that statutory provision.

Under Section 15(6), the Commission is empowered to prescribe divisions of joint rates for the future only. The single statutory exception relates to divisions of rates where the rates themselves have been prescribed by the Commission. The Northern railroads concede that, under Section 15(6), "the Commission is without authority to prescribe divisions retroactively except in circumstances not here present" (Petition, p. 4). However, the sole purpose and effect of the order sought by the Northern railroads' Petition for Rehearing is to avoid this statutory limitation. The Northern railroads are asking this Court to use its equity powers to give retroactive effect to inflated divisions which might be accorded the Northern railroads in the proceedings upon remand. This request is flatly inconsistent with the policy of Section 15(6).

In *Brimstone R.R. and Canal Co.* v. *United States,* 276 U.S. 104 (1928), this Court reviewed the legislative history of Section 15(6) and explained the purpose of Congress in precluding retroactive application of divisions of agreed joint rates, as follows (276 U.S. at 121-122):

> "Section 15(6) established the right to prescribe future divisions of agreed rates, but we think *the studied pur-*

pose was to grant no power to require readjustments of past receipts from agreed joint rates. Theretofore power in respect of past divisions existed only when rates had been determined and prescribed after full hearing—that is where the commission had passed upon the reasonableness of the rate and required observance. *Obviously a carrier may have assented to a through rate only because of the divisions accorded to it: to permit the Commission to change this arrangement as to past transactions would be exceedingly harsh if not wholly unreasonable.* Ordinarily, divisions of a particular rate are not of public interest if the rate itself is reasonable.

• • •

"The power to require readjustments for the past is drastic. It may reasonably exist in cases where the particular rate has been approved by the Commission after full hearing: it ought not to be extended so as to permit unreasonably harsh action without very plain words." (emphasis supplied)

The limitations upon the Commission's power to prescribe retroactive divisions of agreed joint rates thus reflect the "studied purpose" of Congress to preclude such retroactivity. Retroactive application of divisions was held to be inequitable, indeed harsh, where a railroad voluntarily enters into joint rates and remains a party to the agreed joint rates because the divisions are acceptable. Once a shipment has moved, a railroad cannot retroactively withdraw from a rate already paid by the shippers. In all fairness, therefore, orders prescribing divisions of agreed rates must operate prospectively only.

The statutory policy precluding retroactive determination of divisions is particularly applicable in this case. The Southern railroads have entered into numerous joint rates with the Northern railroads since the litigation in this case began; and virtually all North-South rates have

been the subject of adjustment in general increase proceedings. In making and adjusting these joint rates, the parties have relied upon existing divisions arrangements, including the North's resettlement obligation. The Southern railroads have acted on their belief (since confirmed by the district court and this Court) that the Commission's 1965 order was invalid; their position with respect to new and adjusted rates has been based upon the statutory provision that the equal-factor basis of divisions established in 1953 could not be changed except prospectively, by virtue of a valid Commission order. The Northern railroads confirmed this premise by undertaking to refund revenues in excess of the equal-factor divisions if the 1965 order were held to be invalid. In this situation, it would be patently inequitable to nullify the limitations of Section 15(6) and give retroactive effect to a Commission order prescribing divisions.[9]

United States v. *Morgan,* 307 U.S. 183 (1939), heavily relied upon by the Northern railroads, arose out of an entirely different situation and was governed by an entirely different statute. Indeed, the Court emphasized in *Morgan* that: "Decision turns on the meaning and application of the Packers and Stockyards Act" (307 U.S. at 188). The Court cited the provisions of that Act which provided for reparations where rates were found to be unreasonable (307 U.S. at 189), and explained that the action of the district court in ordering that the rates in controversy be deposited in a court-administered fund had "obstructed any effective reparations order" (307 U.S. at 193) because the regulated

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[9] Moreover, such action could only produce chaos in the period preceding a Commission decision on remand, for without knowledge of the divisions that would ultimately apply to traffic that moved in that period, neither the Southern railroads nor the Northern railroads could sensibly decide upon their participation in many joint rate proposals.

market agencies no longer were in possession of the revenues for payment of reparations (307 U.S. at 197). *Morgan* held that equity would not allow the statutory policy favoring retroactive application of rates to be obstructed and frustrated by distribution of the impounded fund to the market agencies.

In *Brimstone,* on the other hand, the Court recognized that Congress had expressed its "studied purpose" in differentiating between divisions, as to which retroactive adjustments on "past transactions would be exceedingly harsh if not wholly unreasonable" (276 U.S. at 122), and rates, as to which the Commission was given extensive reparations power (49 U.S.C. §§ 8, 9). The Congressional determination of the essential equities with respect to divisions necessarily governs a court of equity in dealing with the same subject.

The *Morgan* principle that court and agency should work together to achieve "the plainly indicated objects of the statute" (307 U.S. at 191) required the retroactive judicial application of rate orders under the Packers and Stockyards Act, only because that Act itself provided for retroactive adjustments of rates through reparations. The same principle precludes a court of equity from fashioning a procedure which calls for the retroactive application of divisions contrary to the "studied purpose" of Congress.

The Northern railroads do not cite any case in which a divisions order has been given retroactive application, contrary to the purpose of Congress as described in the *Brimstone* case. The Northern railroads ask the Court to "See *B&O R. Co.* v. *United States,* 279 U.S. 781 (1929)" (Petition, p. 3). In that case, a Commission order had been set aside for lack of supporting evidence, *Baltimore & Ohio Ry. Co.* v. *United States,* 277 U.S. 291, 300-301 (1928), and it was thereafter held that the railroads which had lost

revenues under the invalid order were entitled to restitution (279 U.S. at 785-786). The case thus vindicates the purpose of Section 15(6) as stated in the *Brimstone* case by holding that, even if there had been no resettlement condition in the consent decree of the district court denying an interlocutory injunction in this case, the Northern railroads would still be obligated to resettle the divisions collected during the period of litigation under the invalid Commission order.[10]

The Northern railroads conceded in the district court that restitution of the revenues in controversy would be the necessary effect of a judgment setting aside the Commission's order of February 3, 1965,[11] and that this practice in divisions cases was reflected in the accounting rules of the railroad industry.[12]

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[10] In *United States* v. *Baltimore & Ohio Ry. Co.*, 284 U.S. 195 (1931), three Commission orders had been entered prescribing the same divisions. The first order was not supported by evidence; and the second order raised a question of adequacy of the statutory 30-day notice. This Court held that the divisions took effect with the third order, over a dissent contending that the second order was sufficient. No member of the Court believed that the divisions could be made effective retroactive to the date of the first order, which is the necessary effect of the Northern railroads' contention here.

[11] The Answer of Defendant Northern railroads to Plaintiff Southern railroads' Application for Interlocutory Injunction, April 7, 1965, stated (p. 2): "If there were no stay and the order were later held invalid, northern lines would have to resettle accounts on the basis of the present divisions."

[12] This is shown in the affidavits filed in the district court by the Northern railroads in opposition to the Southern railroads' Application for Interlocutory Injunction. Affiant E. T. Scheper, Auditor of Freight Accounts of the New York Central, testified (Affidavit dated April 8, 1965, p. 4): "If the Commission's order is not stayed and after hearing on the merits this Court sets aside the Commission's order, it will be necessary to resettle accounts. Affiant further says that in the last situation, although resettlement of accounts

Thus, the procedure now requested by the Northern railroads is not only inequitable and contrary to the statutory policy, but conflicts with court decisions and industry practice in divisions cases.

III. THERE ARE NO EQUITABLE CONSIDERATIONS THAT WOULD PERMIT THE NORTHERN RAILROADS TO RETAIN THE REVENUES IN CONTROVERSY.

As previously shown, both the Northern railroads' obligation to restore the pre-existing uniform basis of divisions, and the statutory policy forbidding retroactive application of division orders, require denial of the Petition for Rehearing. We shall now show in addition that the equities of this case independently support the conclusion that the Northern railroads should not be permitted to benefit from the Commission's invalid order.

A. Equitable Considerations Do Not Support an Order Permitting the North to Retain an Inflation in Divisions Which Has Not Been Supported by Evidence.

The Northern railroads' Petition assumes that this Court held the Commission's order to be deficient solely because

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would be required, such resettlement would not subject complainants to irreparable injury for the reason that the Freight Mandatory Railway Accounting Rules to which all parties to this proceeding are subscribers would require that the New York Central and other intervening defendants resettle their interline accounts with the complainants on the basis in effect prior to April 20, 1965."

Similarly, Affiant R. S. Bergey, Freight Auditor of the Pennsylvania Railroad, testified (Affidavit dated April 7, 1965, pp. 11-12): "If there were no stay and the order were later held invalid, the settling carriers would have to resettle accounts on the currently effective basis. This would be automatically necessary under the accounting rules, as invalidation of the order would destroy the basis on which the divisions prescribed by it depended."

the Commission failed to make "specific findings" with respect to three particular cost items (Petition, p. 2). In so construing this Court's opinion, the Northern railroads simpy ignore the principal holding of the Court that the Commission's order was not supported by substantial evidence. The Northern railroads are obliged to ignore this central holding of the Court because the cases upon which they rely have no application to the present case, in which Appellants have failed to present necessary supporting evidence.

Before the Commission, the Northern railroads conceded that they sought "disproportionate divisions of a uniform structure of rates" (A. 1543) on the basis of the costs of North-South traffic. However, the North relied upon the average costs of all traffic, and failed to present evidence relating to the cost of the North-South traffic in issue. The Commission's order granting the North inflated divisions was challenged in the three-judge district court, and again in this Court, on two grounds: first, that the order was not supported by substantial evidence, in violation of Section 10(e) of the Administrative Procedure Act; and, second, that findings of the Commission dealing with particular contested cost items were inadequate, in violation of Section 8(b) of that Act.

The opinion of this Court deals separately with the evidence issue and the findings issues (after quoting Sections 10(e) and 8(b)) (393 U.S. at 90, note 2). The opinion first deals with the question of lack of substantial evidence, and concludes as follows (393 U.S. at 91-92):

> "We agree with the District Court that there is no substantial evidence that territorial average costs are necessarily the same as the comparative costs incurred in handling North-South freight traffic. If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly repre-

sent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is."

Having concluded that the Commission's order must be set aside for lack of substantial evidence, the Court's opinion also holds that: "On remand of the case to the Commission we think specific findings must be made on . . . several [cost] items" (393 U.S. at 93). These directions in connection with the remand do not detract at all from the principal holding of the opinion that the order must be set aside for lack of substantial evidence.

None of the decisions upon which the Northern railroads' Petition relies sanctions equitable relief for a litigant who has failed to present evidence necessary to support his claim. In *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301 (1935), the initial rate increase order of the Commission was held defective by the Court "solely upon the ground that the facts supporting the conclusion were not embodied in the findings" (295 U.S. at 311). The deficiencies of findings were regarded as "imperfections of form, . . . slips of procedure" (295 U.S. at 312). The railroad in that case had presented in evidence all of the facts necessary to support the rate increase ordered by the Commission, and these increased rates were collected until the Commission's order was held to be invalid, without any commitment by the railroad to refund the excess rates if the order were later set aside.[13] After these procedural slips were remedied by a second Commission order granting the same rate increase, this Court permitted the railroad to retain those rates because equity would not "make the

[13] The railroad did not collect the increased rates for the period between the judicial determination that the first Commission order was invalid, and the effective date of the second Commission order (295 U.S. at 307).

carrier pay the price of the blunders of the commerce board in drawing up its findings" (295 U.S. at 314).

Atlantic Coast Line was relied upon by the dissenting Justices in the *Milwaukee* case (*supra*, pp. 4-5) because the order of the Commission in *Milwaukee* had also been held defective "solely" on the ground of inadequacy of findings by the Commission, rather than because of any failure of the railroad to present necessary evidence (356 U.S. at 907).

The same principle was the basis for the decision in *United States* v. *Morgan*, 307 U.S. 183 (1939), where the Court ordered that rates deposited with the district court not be returned to the regulated market agencies[14] in light of the fact that the first order of the Secretary, like the Commission order in *Atlantic Coast Line*, was "voidable for procedural defects" (307 U.S. at 196). The procedural defect in *Morgan* was the "failure of the Secretary to follow the procedure prescribed by the statute" (307 U.S. at 185). No deficiency was found in the record, which contained voluminous evidence that was not even reviewed by the Court (307 U.S. at 188).

The equities in the cases upon which the Northern railroads base their Petition are thus just the opposite of the equities in the present case. This Court has held that, although the "Southern roads had offered evidence showing the costs of handling North-South traffic in the South," the North failed to present comparable evidence (393 U.S. at 91). The Northern railroads were the proponents of an

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[14] The fund consisted of the amount of the rate reduction paid into court during the litigation arising out of the first order of the Secretary. There was no claim that the Secretary's second order could be made effective for the period between the date the first order was held invalid and the date of the second order—the controversy over the rates for this period having become moot because the Secretary had agreed to increased rates (307 U.S. at 199).

order prescribing an inflation in the North; and under Section 7(c) of the Administrative Procedure Act, the proponents of an order "shall have the burden of proof" (5 U.S.C. § 556). The Northern railroads have only themselves to blame for the absence of substantial evidence in this record which resulted in the invalidity of the Commission's order. The present case having turned on the lack of essential evidence, the Northern railroads cannot now claim that they are in the position of the railroad in *Atlantic Coast Line,* or the rate-payers in *Morgan,* who had presented ample evidence to support their position but had seen an administrative order in their favor held defective for purely procedural defects which were solely the fault of the administrative agency.

The remaining two cases cited by the Northern railroads in their Petition are inapposite for similar reasons. In *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607 (1944), there was no contention of any lack of evidence to support the employees' suit for wage payments. The case turned on the administrative definition of the coverage of the Fair Labor Standards Act (322 U.S. at 609). Similarly, in *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954), there was no holding that there was any deficiency in the evidentiary record upon which the Commission had acted. The case was remanded because the Commission had "not adequately explained its departure from prior norms and . . . sufficiently spelled out the legal basis of its decision" (347 U.S. at 653).[15]

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[15] The Northern railroads state that in *Secretary of Agriculture* the case was remanded "but without setting the Commission's order aside" (Petition, p. 7). Whatever may be the extent of a court's power to remand a case for further findings or explanation by an administrative agency without setting aside the order, it is the statutory requirement of Section 10(e) of the Administrative Procedure Act that: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . ." (5 U.S.C. § 706).

B. The Procedure Sought by the Northern Railroads Is Contrary to the Public Interest.

In *Morgan*, the Court invoked the principle (307 U.S. at 194):

> "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved."

This principle was applied in *Morgan* to protect the public, for whose benefit the reparations provisions of the Packers and Stockyards Act had been passed, from the consequences of the district court's having taken possession of the excess rates (*supra*, pp. 14-15).[16] In divisions cases, however: "Ordinarily, divisions of a particular rate are not of public interest," as observed in *Brimstone* (276 U.S. at 122).

Unlike the *Milwaukee* case (supra, pp. 4-5) in which the dissenting Justices were of the opinion that the railroad should be relieved of its agreement to resettle because of "the rights of the public" and "the policy of the Federal Act protecting the revenues of interstate carriers" (356 U.S. at 909), in the present case the Northern railroads are unable to suggest any reasons of public interest or statutory policy that could justify relieving them of their agreement to make resettlement. No such reasons are pres-

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[16] The *Atlantic Coast Line* case concerned orders of the Commission which affected the public interest in preventing unjust discrimination against interstate commerce (295 U.S. at 306).

An additional equity stressed by the Court in *Atlantic Coast Line* was that the prior rates were so low as to be confiscatory (295 U.S. at 313). In the present case, the Northern railroads cannot invoke any such equity. Under the pre-existing uniform divisions, the profit of the Northern railroads exceeded $55 million per year ($221,430,000 revenue as compared with the overstated full costs found by the Commission of $165,746,000 (325 I.C.C. at 25-26; A. 48-49)).

ent in this case, as the Commission itself concluded in expressly disclaiming public interest considerations such as revenue needs as the basis for its order of February 3, 1965.[17]

Any possible doubt that carrier agreements to resettle divisions might conflict with the public interest was eliminated by the Commission itself when it modified its order of February 3, 1965 "to allow the establishment of a basis of divisions other than those prescribed, when agreed to by all parties affected thereby."[18] Where, as here, the Commission itself has expressly sanctioned carrier agreements

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[17] As this Court held (393 U.S. at 94):

"Revenue problems under § 15(6) at times have resulted in putting a part of one area's transportation costs upon other sections of the country. See *New England Divisions* Case, 261 U.S. 184, 191-195. But that issue is not presented in these cases. The issue in the present case was costs, not revenue. . . .

"On revenue needs the Commission said:

'We find that no affirmative reasons appear in this record which would warrant any adjustment of the divisions in question over and above the relative costs of service, either on the grounds of greater revenue needs or otherwise. 325 I.C.C., at 49.'"

[18] Order dated May 24, 1966, I.C.C. Docket No. 29885. The recital to that order states:

"That in the absence of reason or cause for the Commission to prescribe divisions of revenues from joint rates, *such divisions are ordinarily the concern of the carriers;* and that the parties should be permitted to negotiate and mutually agree upon the establishment of different divisions of revenue in lieu of those prescribed as conditions may warrant." (emphasis supplied)

This order, which was modified by order dated February 1, 1967, to require that notice of agreed divisions be given to all parties in the proceeding, formalized the Commission's prior practice of vacating its order of February 3, 1965, whenever the parties agreed upon divisions other than those prescribed.

which result in divisions other than those prescribed, there is no possible basis for any contention that enforcement of the Northern railroads' agreement to resettle and restore the pre-existing uniform basis of divisions is inconsistent with the public interest or the policy of the Interstate Commerce Act.

On the contrary, public interest considerations condemn the Northern railroads' efforts to avoid an immediate restoration of the pre-existing uniform basis of divisions. As the Court held (393 U.S. at 92):

> "If . . . [reliance upon costs unsupported by substantial evidence] were sanctioned in a North-South divisions case, whose solution turns solely on costs, the class rate discrimination in favor of the North and against the South which we condemned in *New York* v. *United States,* 331 U.S. 284, could well flourish in another form."

Under these circumstances, it would be contrary to the public interest in preventing territorial discrimination to perpetuate the Northern inflation prescribed in an invalid Commission order.

C. The Northern Railroads' Assertions With Respect to Accounting Expense Are Contrary to Their Representations in the District Court.

Counsel for the Northern railroads also argue that the Court should act to prevent enforcement of their agreement to restore the pre-existing uniform basis of divisions because resettlement "would entail a large amount of accounting work and expense" (Petition, p. 3). This claim, even if true, would not justify rescinding the Northern railroads' agreement to resettle. Moreover, this assertion of counsel is contrary to the affidavits of the Northern railroads' accounting officers, filed in the district court in opposition to the Southern railroads' Application for Interlocutory Injunc-

tion. These officers testified that no more than "nominal expense" would be involved in restoring the pre-existing divisions.[19] The present argument is also inconsistent with the position taken by the same counsel that in view of the Northern railroads' agreement to resettle, a court should not concern itself with the cost of resettlement.[20]

The Court should not countenance the Northern railroads' present effort to renege not only on their agreement to resettle but on their sworn representations to

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[19] New York Central Auditor E. T. Scheper (Affidavit dated April 8, 1965, pp. 2-3):

> "[T]he double (second) changeover which might be entailed if the Commission's order is ultimately not upheld should neither disrupt plaintiffs' accounting staffs, impair other Accounting Department procedures nor involve more than nominal expense because the accounting machine cards and tapes and charts now employed can be retained and readily substituted for the new cards, tapes and charts required on and after April 20, 1965."

Pennsylvania Auditor R. S. Bergey (Affidavit dated April 7, 1965, p. 15):

> "We would maintain our present file until the case is resolved, and, therefore, the cost in any reconversion would be nominal and is estimated to not exceed $1000.00 plus about $180.00 cost per month to convert new records established in the intervening period."

[20] Memorandum in Opposition to Application for Interlocutory Injunction dated May 17, 1965, p. 12:

> *"But the question of the exact cost of making the resettlement is not a material question for this Court to consider in arriving at its decision as to whether or not to grant an interlocutory injunction. The Intervening Defendants are willing to assume the obligation of paying Plaintiffs their reasonable costs for this work should the Commission's order go into effect and the Court should later decide that the order be set aside as unlawful.* They respectfully ask the Court to deny the application for an interlocutory injunction and to make such obligation to repay accounting costs, in the contingency specified, a condition of the order." (emphasis in the original)

the district court, on the basis of which they obtained possession of the revenues in question through denial of an interlocutory injunction below.

Furthermore, the Northern railroads have benefited from their possession of the revenues in dispute during the period of litigation to an extent far exceeding the costs of resettlement. Under the order of the district court, the Northern railroads have held this money subject to resettlement at a 5% rate of interest (A. 170) during a period in which interest rates have risen to 7% and above. Under these economic conditions, the Northern railroads have benefited to a very material extent from denial of the interlocutory injunction subject to the agreed conditions. Thus, the expense of resettlement lends no equity whatever to the Northern railroads' effort to annul their agreement and continue to reap the benefits which they would never have enjoyed if the district court had known at the outset of the litigation what it later concluded on the merits—that the Commission's order of February 3, 1965, was not supported by substantial evidence.

CONCLUSION

Denial of the Northern railroads' Petition for Rehearing will restore the Northern and Southern railroads to the equal basis of divisions which was in effect for over twelve years prior to this litigation, and will place the parties in precisely the situation that they would be in today if the Commission's invalid order had never gone into effect. An interlocutory injunction was not issued, and the Commission's order did go into effect, only because the Northern railroads agreed to return the money if the order were later found to be invalid. Reasons of statutory policy with respect to retroactive application of divisions, the public interest in uniformity of territorial relationships and the

equities of this case provide additional reasons for enforcing the Northern railroads' agreement, not for relieving those railroads of their bargain. It is not the function of this Court to relieve business corporations, represented by counsel, from the fully-contemplated consequences of an agreement under which those corporations have benefited since the beginning of this litigation.

For the foregoing reasons, the Northern railroads' Petition for Rehearing should be denied.

Respectfully submitted,

JOHN W. ADAMS
PHIL C. BEVERLY
JAMES A. BISTLINE
H. T. COOK
HOWARD D. KOONTZ
E. R. LEIGH
JOHN E. MCCULLOUGH
DONAL L. TURKAL

PHELPS, DUNBAR, MARKS
CLAVERIE & SIMS

SIDLEY & AUSTIN

Of Counsel.

ASHTON PHELPS
JACK M. GORDON
1300 Hibernia Building
New Orleans, Louisiana
70112

HOWARD J. TRIENENS
GEORGE L. SAUNDERS, JR.
R. EDEN MARTIN
11 South LaSalle Street
Chicago, Illinois 60603

Attorneys for Appellees Aberdeen and Rockfish Railroad Company, et al.

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